Supreme Court, U.S.
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No. 95-273

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KEYSTONE SANITATION COMPANY, INC., *et al.*,
Petitioners,

v.

ARCATA GRAPHICS FAIRFIELD, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION OF RESPONDENT QUEBECOR PRINTING FAIRFIELD INC. (FORMERLY KNOWN AS ARCATA GRAPHICS FAIRFIELD, INC.)

DANIEL J. DUNN *
WALTER H. SARGENT
HOLME ROBERTS & OWEN LLC
1700 Lincoln, Suite 4100
Denver, CO 80203
(303) 861-7000
Counsel for Respondent Quebecor Printing Fairfield Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

56 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

The District Court found a limited subject-matter waiver of attorney-client privilege based on the production of documents that revealed confidential attorney-client communications about an apparent plan to fraudulently convey assets out of the reach of judgment creditors. A petition for mandamus, asserting that the waiver of privilege should be limited to the documents already disclosed, was filed with the Court of Appeals. Did the Court of Appeals abuse its discretion by denying mandamus relief from the District Court's interlocutory discovery ruling?

RULE 29.1 STATEMENT OF CORPORATE AFFILIATIONS

Respondent Quebecor Printing Fairfield Inc. is a wholly-owned subsidiary of Quebecor Printing Graphics Company, which is a wholly-owned subsidiary of Arcata Corporation, which is a wholly-owned subsidiary of Quebecor Printing (USA) Holdings Inc., which is a wholly-owned subsidiary of Quebecor Printing Inc., which is a publicly-owned Canadian corporation.

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BRIEF IN OPPOSITION OF RESPONDENT QUEBECOR PRINTING FAIRFIELD INC. (FORMERLY KNOWN AS ARCATA GRAPHICS FAIRFIELD, INC.)

Respondent Quebecor Printing Fairfield Inc. (formerly known as Arcata Graphics Fairfield, Inc.) respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the judgment of the United States Court of Appeals for the Third Circuit in this case. That judgment, a summary denial of mandamus, is unreported, and has been reprinted in the appendix to the petition for writ of certiorari ("Pet. App.") at 1a.

COUNTERSTATEMENT OF THE CASE

This matter arises out of investigations by the United States Environmental Protection Agency ("EPA") into contamination at the Keystone Landfill site in Pennsyl-

vania. In July 1990, following lengthy investigations, EPA completed a Remedial Investigation/Feasibility Study ("RI/FS") of the site, characterizing the contamination and discussing cleanup alternatives. On September 30, 1990, EPA issued a Record of Decision ("ROD") in which it selected and explained the site remediation plan. The cost of cleaning up the site was estimated to be at least $9.1 million.

The United States filed suit in the United States District Court for the Middle District of Pennsylvania in 1993, seeking to recover all past and future costs of investigating and cleaning up the site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. §§ 9601-9675. In its complaint, the United States named two groups of defendants—(i) the long-time owners and operators of the Keystone Landfill facility, petitioners Keystone Sanitation Company, Inc., Kenneth F. Noel, and Anna M. Noel (collectively, the "Keystone Defendants"),[1] and (ii) the so-called "Generator Defendants," eight companies[2] that EPA selected from among thousands of similarly situated companies that allegedly generated hazardous substances in wastes that were transported to the site for disposal. The Generator Defendants cross-claimed against the Keystone Defendants, and also filed a third-party complaint against other similarly situated companies that had been identified as potentially responsible parties ("PRPs").[3]

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[1] Keystone Sanitation Company is wholly-owned by Ken and Anna Noel, who are husband and wife.

[2] The Generator Defendants include Quebecor Printing Fairfield Inc. (formerly known as Arcata Graphics Fairfield, Inc.); C & J Clark America, Inc.; The Esab Group, Inc.; The Genlyte Group, Inc.; Hanover Bronze and Aluminum Foundry, Inc.; Kemper Industries, Inc.; R. H. Sheppard Co.; and SKF USA, Inc.

[3] For administrative convenience, EPA had elected not to sue those additional PRPs, relying instead on its claimed entitlement to

Discovery began. In January 1994, after finding out that Keystone Sanitation Company had sold virtually all of its assets to Waste Management of Pennsylvania, Inc., soon after the magnitude of the Keystone Defendants' potential liability for cleanup costs became known, Generator Defendant Quebecor Printing Fairfield Inc. (then known as Arcata Graphics Fairfield, Inc.), on behalf of itself and for the benefit of the other Generator Defendants, served the Keystone Defendants with a notice of deposition and request for production of certain documents, including all documents related to the asset sale and all documents related to the location, use, or expenditure of proceeds from that sale. Apart from providing a heavily redacted version of the asset purchase agreement and a list of employees, the Keystone Defendants refused to comply with the request for documents. In addition, during the depositions that followed, the Keystone Defendants' counsel repeatedly instructed his clients, Ken and Anna Noel, not to answer questions from Quebecor's counsel about the sale of assets to Waste Management or about the disposition of the sale proceeds, including questions about whether the sale was part of an attempt to protect the Keystone Defendants' assets from an eventual judgment against them for CERCLA response costs. The Keystone Defendants' counsel did not contend that the questions sought privileged information, but merely asserted that they were not "reasonably calculated to lead to the introduction of admissible evidence."

Quebecor moved to compel discovery. The District Court ordered the Keystone Defendants to produce the requested documents relating to the asset sale, and also admonished the Keystone Defendants' counsel to stop instructing witnesses not to testify about nonprivileged matters.

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recover from selected PRPs under a theory of joint and several liability.

On June 21, 1994—approximately five months after the initial request for production, and just one day before the deposition of the Noels resumed—the Keystone Defendants produced some documents gathered from files maintained by their attorneys.[4] Although requested, no privilege log was provided to identify any allegedly privileged documents that the Keystone Defendants were either producing or withholding. According to the Keystone Defendants' counsel, there were no such documents.

The production of documents took place at the offices of the Keystone Defendants' attorneys. Quebecor's counsel was permitted to take the documents out of those offices for copying. The Keystone Defendants' counsel did not check to see if any of the documents selected for copying were privileged or otherwise protected from disclosure.

Two of the documents produced by the Keystone Defendants that day are the focus of the petition for certiorari. The first, designated Deposition Exhibit 309, is a printout of an electronic mail message from one of the Keystone Defendants' attorneys to several of his colleagues, including the Keystone Defendants' current trial counsel. The document is dated July 19, 1991—about

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[4] The Keystone Defendants have stated—and continue to state, *see* Pet. at 3—that the documents "completely filled two 10" x 12" x 16" cardboard storage cartons," and "totall[ed] about 10,000 pages." *Id.* at 4. Quebecor's counsel has disputed those allegations, stating in the District Court that the number of pages was far less than 10,000, and estimating the number of documents as "significantly less than 1,000." Even assuming, however, that the Keystone Defendants correctly estimate that the documents "completely filled" about two cubic feet of space, it is clear that this was not a massive document production. Moreover, the District Court would later expressly reject the Keystone Defendants' protestations about "massive production" and the burdens it imposed on the document screening process, finding that, in light of the amount of time that the Keystone Defendants had to collect and review the documents prior to production, "the precautions taken [to prevent inadvertent disclosure of privileged documents] were not reasonable." *See* Pet. App. 14a-15a.

one year after EPA published its RI/FS and ROD discussing the remediation plan for the Keystone Landfill site and the projected costs of cleanup. The document describes communications between the Keystone Defendants and counsel regarding "environmental liability cases," and concludes with the following statement: "I see out [*sic*] main goal, apart from defending the environmental liability claims, is to encourage the Noels to take as much out of the corporation as they legitimatly [*sic*] can do."

The second document, designated Deposition Exhibit 310, is a printout of another electronic mail message generated by another attorney at the same law firm. Like Exhibition 309, Exhibit 310 indicates that it was generated in 1991, the year after EPA disclosed its remediation plan and the projected costs of cleanup. Exhibit 310's one-sentence text reads as follows: "If one is a Florida resident, one's homestead (principal) residence is exempt from levy by creditors, in an unlimited amount." Attached to the printout is an article about the downfall and liabilities of former major league baseball commissioner and lawyer Bowie Kuhn, with highlighted paragraphs discussing allegations that Kuhn sold his $1.2 million home in New Jersey, moved to a new million-dollar house in Florida, and transferred a $2 million investment account to Florida "to take advantage of the legal protection [Florida] provides to personal property in bankruptcies."

On June 22, 1994, the deposition of the Noels resumed. Quebecor's counsel questioned the Noels extensively about a number of the documents that had been produced, including Exhibits 309 and 310. The Keystone Defendants' counsel made no objections to the questions on privilege grounds.[5]

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[5] Questions about Exhibit 310 led to some revealing, if somewhat evasive, testimony from the Noels. For example, regarding a suggestion that the Keystone Defendants might be attempting to transfer assets away from creditors by, for example, moving assets into Florida, Ken Noel admitted that he and his wife had recently bought some property in Florida. In addition, after first denying

Immediately following the deposition, Quebecor's counsel again requested that the Keystone Defendants produce documents related to the asset sale to Waste Management and other asset transfers. Once again, the Keystone Defendants generally refused to comply with the requests, again asserting that the requested documents were "neither admissible nor reasonably calculated to lead to the discovery of admissible evidence." After further attempts to obtain the requested documents, Quebecor's counsel again sought help from the District Court, which held a hearing and, on August 26, 1994, issued an order compelling the Keystone Defendants to respond to Quebecor's discovery requests "fully," "in good faith," and "[w]ithout further delay."

Some documents were produced pursuant to the District Court's order. Others were not. In particular, the Keystone Defendants refused to produce unredacted attorney billing statements related to the Keystone Defendants' transfer and disposition of assets after EPA's investigations of the Keystone Landfill site in 1990. The Keystone Defendants asserted that the billing statements' narrative descriptions of services performed and the names of the attorneys who performed those services were protected from disclosure by the attorney-client privilege and the work-product doctrine. In response, Quebecor pointed out that documents already produced by the Keystone Defendants, including Exhibits 309 and 310, had already revealed the nature and substance of legal advice related to the Keystone Defendants' transfer and contemplated disposition of assets, resulting in waiver of any privilege for other documents on the same subject. The parties took their dispute back to the District Court, which agreed with Quebecor and found that there had been a waiver of any privilege that may have protected from disclosure

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that the Noels had any accounts in any out-of-state banks, Mr. Noel admitted that they might have a small savings account in a bank somewhere in Florida, though he said that he couldn't remember the name of the bank or the city where it was located.

those billing statements relating to the Keystone Defendants' transfer of assets. *See* Pet. App. 11a-16a (District Court's order of October 19, 1994).

The Keystone Defendants still did not produce the requested documents, however. Instead, they filed a "motion for reconsideration." The District Court denied the motion, but agreed to temporarily stay its orders compelling production to permit the Keystone Defendants to petition the Court of Appeals for a writ of mandamus. *See* Pet. App. 17a-21a (District Court's order of January 13, 1995).

On January 19, 1995, the Keystone Defendants filed their petition for a writ of mandamus, contending that (i) Exhibits 309 and 310 were not themselves communications that had been protected by the attorney-client privilege, so their disclosure could not support a finding that any privilege had been waived, and (ii) even if Exhibits 309 and 310 had been protected by the attorney-client privilege, their disclosure waived the privilege only as to those two documents themselves.[6]

Upon order of the Court of Appeals, Quebecor filed an answer to the Keystone Defendants' mandamus petition, setting out the foregoing history of the case[7] and noting that the Keystone Defendants had, among other things, (i) conceded that their "inadvertent" disclosure had waived any privilege that might have protected Exhibits 309 and 310 and (ii) failed to demonstrate, under this Court's standards for mandamus, that the District Court

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[6] It should be noted that, to the extent that the Keystone Defendants had contended in the District Court that the subject documents were protected from disclosure by the attorney work-product doctrine, *see supra* p. 6, those contentions were abandoned in the petition for mandamus and have not been raised in this case since.

[7] To permit the Court of Appeals to verify everything in its counterstatement of the case, Quebecor's answer also included an extensive, 24-tab appendix of documents.

committed a "clear error of law" in not limiting waiver to the documents already disclosed, particularly where there was a prima facie showing that the attorney-client communications had been in furtherance of wrongful ends.

After receiving Quebecor's answer, a three-judge merits panel of the Court of Appeals concluded that oral argument and further briefing on the petition would not be needed. On May 12, 1995, the panel issued its judgment order, summarily denying the petition. *See* Pet. App. 1a-5a. Two weeks later, the Keystone Defendants filed a petition for rehearing and a suggestion for rehearing en banc, both of which were summarily denied. *See id.* at 6a-10a.

The Keystone Defendants still did not produce the documents. They also did not seek a stay of the mandate of the Court of Appeals pursuant to Rule 41 of the Federal Rules of Appellate Procedure pending the filing and disposition of a petition for certiorari in this Court. The Court of Appeals issued its mandate. The District Court's stay of its orders compelling production having now expired, Quebecor again demanded the documents. Again, the Keystone Defendants refused, instead filing yet another motion—this one requesting that the District Court extend the stay of its discovery orders pending the filing and disposition of a petition for certiorari in this Court.

The District Court denied the Keystone Defendants' motion for a stay, and ordered the Keystone Defendants to produce the documents "immediately." *See* Appendix ("App.") included herewith, at 31a-32a. The District Court found that the Keystone Defendants had failed to demonstrate any of the requirements for the requested stay, including the requirement that there was a "reasonable probability" that this Court would grant certiorari. *See id.* at 25a-26a. Moreover, said the District Court, "[t]he court has been most patient and generous in granting stays to the Keystone Defendants on this matter up to this point, and finds that with the disposition of

the preliminary injunction matter [8] . . . and the impending need to consider permanent injunction relief in this matter, the time is ripe to complete the discovery on this issue." *See id.* at 26a.

The Keystone Defendants refused to comply with the district court's order to produce the documents "immediately," and also failed to respond to still another written demand for the documents from Quebecor. Instead, they filed with the Court of Appeals another motion for stay pending disposition of their petition for certiorari. That motion was summarily denied. The Keystone Defendants still refused to produce the documents and, on September 5, 1995, filed yet another motion for stay with this Court's Justice Souter, who summarily denied the motion the next day without waiting for any response.

Back in the District Court, the Generator Defendants have filed a motion for contempt and motion for sanctions against the Keystone Defendants based on their actions in this discovery battle. In response, the Keystone Defend-

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[8] On the same day that it denied the Keystone Defendants' motion for a further stay, the District Court, upon the motion of Quebecor and others, also issued a preliminary injunction enjoining the Keystone Defendants and various related entities and individuals from "transferring, dissipating, encumbering, or otherwise adversely affecting the value of any cash, real or other property, or any other assets" in the possession of Keystone Sanitation Company or any of certain other related entities. *See* App. 29a. The District Court found that "the Generator Defendants are likely to succeed in showing that the Keystone Defendants have transferred and will continue to transfer assets to avoid paying a potential CERCLA judgment, that they will be without funds to satisfy a CERCLA judgment absent injunctive relief, and that the Generator Defendants are likely to suffer irreparable harm of being saddled with the Keystone Defendants' share of joint and several liability if injunctive relief is not granted." *See id.* at 20a. The District Court additionally granted the Generator Defendants leave to amend their cross-claim against the Keystone Defendants to assert a state-law claim for fraudulent conveyance. *See id.* at 20a-21a, 28a.

ants have turned over a few of the documents that they had been ordered to produce.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED IN THE PETITION HAS NOT BEEN PRESERVED FOR REVIEW.

As Quebecor pointed out to both courts below in successfully opposing the Keystone Defendants' motions for a stay pending filing and disposition of the petition for certiorari in this Court, the Keystone Defendants' petition for mandamus in the Court of Appeals raised only two arguments. First, the Keystone Defendants contended that there could be no waiver of privilege in this case because the documents that were "inadvertently" disclosed were not even privileged documents themselves. *See* Petition for Mandamus at 10-13. Apparently recognizing that no "certworthy" issue is presented by that argument, the Keystone Defendants have now conceded—though apparently for purposes of this Court's review only—that "it is undisputed that [Exhibits 309 and 310] were covered by the attorney-client privilege." *See* Pet. at 5 n.4 and accompanying text.

The Keystone Defendants' second argument to the Court of Appeals—and the only remaining basis for certiorari review by this Court—was that, "[e]ven if exhibits 309 and 310 could have been subject to a claim of attorney client privilege, any waiver of privilege as a result of their production should have been limited to the documents themselves." *See id.* at 14-16. The Keystone Defendants *never* contested the issue of whether a privileged document loses its protection upon inadvertent disclosure. Rather, they *expressly conceded* that issue, and did so in language that was both unambiguous and expressly applicable to the facts of this case. *See id.* at 14 ("If exhibits 309 and 310 could have been made the subject of a successful claim of attorney client privilege, there would be a waiver of privilege with regard to those documents them-

selves even through inadvertent disclosure."). Thus, although the Keystone Defendants' current counsel in this Court now assert that the federal courts are divided as to whether and under what circumstances inadvertent disclosure results in a waiver of the privilege, *see* Pet. at 7-8, that alleged split of authority[9] is irrelevant to this case,

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[9] Contrary to the petition's suggestions of a circuit split, *see* Pet. at 8, neither the Eighth Circuit in *John Morell & Co. v. Local Union 304A*, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991), nor the Ninth Circuit in *United States v. Zolin*, 809 F.2d 1411 (1987), *aff'd in part and vacated in part*, 491 U.S. 554 (1989), held that "an inadvertent disclosure of privileged information does not waive the privilege." Rather, each court simply found that, *under the particular circumstances of the case*, the disclosure of certain documents or tapes did not result in waiver of their privileged status. In *John Morell*, documents reflecting attorney-client communications between a company and its counsel were disclosed by a third party that was sharing a joint defense with the company and had obtained the documents in the course of that joint defense. The Eighth Circuit found no evidence that the company itself, or anyone with authority to act on its behalf, had taken any actions that could constitute waiver, and the disclosure by the co-defendant would not change that result. *See* 913 F.2d at 555-56. In *Zolin*, the Ninth Circuit affirmed, under a "clearly erroneous" standard of review, a district court's finding that a secretary's delivery, to a third party, of tapes believed to be blank would not constitute waiver of any allegedly privileged communications contained on the tapes, and at the same time also affirmed the district court's finding that there *had* been a waiver of privilege with respect to documents that had been made available to that same third party under a general grant of permission to review documents, even though there had been no specific permission to review any allegedly privileged documents. *See* 809 F.2d at 1415-17. The *Zolin* decision cannot fairly be read as a holding that "inadvertent" disclosure cannot result in waiver of the privilege. Indeed, Ninth Circuit case law, both before and after the *Zolin* decision, has expressly rejected that position. *See, e.g., United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990) (citing, with approval, *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981)).

In sum, there appears to be no split in the circuits as to whether an inadvertent disclosure *can* waive the privilege; at most, there may be a lack of consensus about whether disclosure *may* or *must*

as is the view of the Keystone Defendants' current counsel that the "correct" rule is that inadvertent disclosure does not waive the privilege. *See* Pet. at 13-22. Similarly, having conceded in the Court of Appeals that any privilege was waived with respect to Exhibits 309 and 310, the Keystone Defendants have failed to preserve for this Court's review their current counsel's further contention, *id.* at 14-15, that an attorney's disclosure, without the knowledge or consent of the client, does not result in waiver of the client's privilege.

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE SCOPE OF WAIVER RESULTING FROM INADVERTENT DISCLOSURE OF PRIVILEGED DOCUMENTS.

As discussed above, the only question that the Keystone Defendants have even arguably preserved in this Court is whether the Court of Appeals should have issued the writ of mandamus to restrict the scope of the waiver of privilege to those documents that had already been disclosed. The Courts of Appeals, however, have consistently held that, where the privilege in an attorney-client communication is waived, that waiver may extend to other communications relating to the same "matters" or "subject matter," even though the waiver may have resulted from an "inadvertent" disclosure. *See, e.g., Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th

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result in waiver. *See, e.g., Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (surveying cases). As the petition acknowledges, however, *see* Pet. at 7, the District Court in the instant case did not apply a *per se* waiver rule, but rather found waiver only after applying a five-factor analysis to the specific facts of the case. *See* Pet. App. 14a-16a. The Court of Appeals could therefore affirm the District Court's finding of waiver in this case without ever reaching the question of whether a *per se* rule of waiver or a multi-factor analysis for determining waiver should apply. Thus, even if the issue had been raised rather than conceded below, no such circuit split could be implicated by the Court of Appeals' denial of mandamus.

Cir. 1992); *John Morell*, 913 F.2d at 556; *In re Sealed Case*, 877 F.2d 976, 980-81 (D.C. Cir. 1989); *Weil*, 647 F.2d at 24. For the contrary proposition that an "inadvertent" disclosure waives the privilege only with respect to the documents actually disclosed, the Keystone Defendants' petition to this Court cites only a few district court opinions, *see* Pet. at 9, 21-22, but a conflict among district courts, or between a Court of Appeals and district courts, creates no basis for certiorari review. *See, e.g.*, ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.8 (7th ed. 1993).[10]

III. THERE IS NO BASIS FOR ASSUMING THAT, IN SUMMARILY DENYING MANDAMUS RELIEF, THE COURT OF APPEALS DECIDED ANY OF THE ISSUES NOW BEING RAISED IN THE PETITION.

The Keystone Defendants assert that, in denying mandamus, the Court of Appeals "directly ruled upon" the question presented by the petition. *See* Pet. at 24. "Thus," say the Keystone Defendants, "the issues upon which the lower federal courts have split are squarely presented in this case." *Ibid.*

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[10] Moreover, even where trial courts have chosen to limit waiver to those documents actually disclosed because disclosure was "inadvertent," they have indicated that they might not find disclosure to be truly "inadvertent" if the actions to protect the documents or rectify the disclosures were insufficient. *See, e.g., Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group*, 116 F.R.D. 46, 52 (M.D.N.C. 1987) ("In this case, the Court finds defendant's procedures adequate to preclude a finding of waiver except as to the Roberts letter itself which has already been fully disclosed."). Thus, even those courts might find subject-matter waiver in the case at hand, where, among other things, there was a finding that "the precautions taken were not reasonable," *see* Pet. App. 15a, and the Keystone Defendants' counsel (i) made no attempt to secure the return of the documents that were disclosed, (ii) permitted their clients to be deposed extensively about the disclosed documents, and (iii) refused even to acknowledge that they had disclosed privileged documents until their filing of the petition in this Court.

Wrong. Putting aside the fact that the question presented by the petition was never even raised in the Court of Appeals, *see supra* pp. 10-12, that court's summary denial of mandamus can hardly be read as a "direct ruling" on any particular issue raised—or not raised—below. Moreover, there is no reasonable basis to infer, simply for purposes of this Court's review, that the Court of Appeals reached any of the matters now being raised in the petition for certiorari. As Quebecor pointed out in its answer to the Keystone Defendants' petition for mandamus in the Court of Appeals, there were a number of bases upon which mandamus could properly be denied. For example, the Keystone Defendants failed to show, as is required by this Court, *see, e.g., Kerr v. United States Dist. Court*, 426 U.S. 394, 403 (1976), that they had no other adequate means of relief. The Keystone Defendants' petition for mandamus merely asserted that "the harm caused by the production of documents and testimony compelled by the district court would be irreparable." Petition for Mandamus at 7. The petition never explained, however, why any damage resulting from an erroneous order to compel production could not be remedied on appeal after final judgment—through, for example, a ruling ordering a new trial, with all improperly obtained documents and information excluded from evidence. *See, e.g., Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 860 (3d Cir. 1994); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993).[11]

The Keystone Defendants also failed to show, as is required by this Court, *see, e.g., Kerr*, 426 U.S. at 403, that their right to the writ of mandamus was "clear and

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[11] As Quebecor pointed out to the Court of Appeals, the Keystone Defendants also failed to seek certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) prior to filing their petition for mandamus, even though the Court of Appeals had previously indicated that it "ordinarily" denies a petition for mandamus where "interlocutory appeal seems a practical but untried avenue." *See In re School Asbestos Litig.*, 977 F.2d 764, 774 (3d Cir. 1992).

indisputable." The petition for mandamus never identified any clear error of law in the District Court's determination, Pet. App. 20a-21a, that the scope of the waiver of privilege should encompass, and be limited to, communications regarding "the disposition of Keystone Sanitation Company and personal assets after the onset of the CERCLA investigation that led to this action." The petition for mandamus simply suggested that the District Court should have refused to allow any further inquiry into attorney-client communications revealed in documents "in the absence of evidence that waiver is being used selectively [by the Keystone Defendants] to prejudice an adverse party." *See* Petition for Mandamus at 15-16. The petition never addressed the various factors and findings, Pet. App. 14a-16a, that led the District Court to its determination of the scope of waiver.

Finally, and perhaps most revealing, the Keystone Defendants have never addressed—in their petition for mandamus or anywhere else—Quebecor's argument that Exhibits 309 and 310, along with all of the other documentary and testimonial evidence gathered in the case, established a prima facie case of fraudulent conveyance "sufficient to satisfy the judge that the light should be let in," *Clark v. United States*, 289 U.S. 1, 14, 15 (1933), under the so-called crime-fraud exception to the attorney-client privilege. *See, e.g., Zolin*, 491 U.S. at 562-63. As Quebecor pointed out to the Court of Appeals in its answer to the petition for mandamus, the District Court had observed in its October 19, 1994, order, which first found waiver in this case,

> the primary goal of CERCLA is to ensure that liable parties bear their fair shares of the costs of environmental clean-up. To preclude discovery as to whether principal potentially responsible parties are or were engaged in the deliberate dissipation of assets for the purpose of avoiding a share of liability runs directly counter to that goal. To do so based upon a claim of privilege, when there has been an inadvertent dis-

> closure of documents *suggesting that this is the case*, runs counter to the interests of justice.

Pet. App. 15a-16a (emphasis added). Moreover, as the Court of Appeals was informed, the District Court continued to receive additional evidence of a scheme of fraudulent conveyances—for example, documents revealing that, on a single day shortly after the asset sale to Waste Management, (i) Keystone Sanitation Company transferred $1.1 million to Kenneth Noel in a dividend check signed by Anna Noel, (ii) the Noels wrote a $1.1 million check to Flatbush Golf Course, Inc., a company that they had recently transferred for no consideration to their children, and (iii) Anna Noel, acting on behalf of Flatbush Golf Course, Inc., wrote a check in the amount of $933,507.17 to retire the outstanding mortgage on the Flatbush golf course.[12] Neither the Keystone Defendants nor their counsel have ever denied the multitude of documented transfers among the Noels and various persons and entities controlled by the Noels, and it appears undisputed that the evidence of a scheme of fraudulent conveyances, carried out with the assistance of counsel, was sufficient to satisfy the crime-fraud exception and thus justify the scope of disclosure required by the District Court.[13]

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[12] These and other apparently fraudulent transactions have been described by the District Court in some detail. *See* App. 15a-20a.

[13] Furthermore, in issuing the preliminary injunction against the Keystone Defendants after the Court of Appeals denied mandamus, *see supra* p. 9 n.8, the District Court reiterated its earlier finding that Exhibits 309 and 310 "strongly suggested that [the Keystone Defendants' attorneys] had actively advised the Keystone Defendants how to take assets out of [Keystone Sanitation Company] at a significant point in the EPA's activities at the Keystone site." *See* App. 6a. Moreover, having reviewed volumes of evidence presented in connection with the preliminary injunction hearings, the District Court found that the evidence "strongly support[s]" the Generator Defendants' claims that the Keystone Defendants have engaged in a scheme of deliberately dissipating assets to avoid paying a potential CERCLA judgment while con-

In light of the many, fully adequate reasons that were presented to the Court of Appeals to support a denial of mandamus, there is no basis for assuming that the Court of Appeals ever had to reach any of the issues that the Keystone Defendants have presented for this Court's review.

IV. THE PETITION IGNORES THIS COURT'S WELL-SETTLED STANDARDS GOVERNING EXTRAORDINARY WRITS, UNDER WHICH THE COURT OF APPEALS' DENIAL OF MANDAMUS WAS CLEARLY CORRECT.

Regarding the procedural posture of this case—a petition for certiorari review of a summary denial of mandamus relief from a trial court's interlocutory orders—the Keystone Defendants say only that "[t]he fact that the legal issues were presented to the Third Circuit on a petition for mandamus is no impediment to this Court's review." *See* Pet. at 24-25. Although there is, of course, no *jurisdictional bar* to certiorari review of a denial of mandamus, this Court has repeatedly counseled that the issuance of a writ of mandamus in anything less than an extraordinary situation would defeat Congress' policy against piecemeal appellate review. *See, e.g., Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) Moreover, this Court has further instructed the Courts of Appeals that, as to matters—such as discovery rulings—that are left almost entirely to the trial court's exercise of its discretion, a writ of mandamus is almost never warranted. *See, e.g., id.* at 36. Finally, this Court has noted that, even where a party has satisfied the stringent conditions for issuance of a writ of mandamus, "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr*, 426 U.S. at 403.

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tinuing to control those assets through related entities. *See* App. 15a-20a.

In this case, the Keystone Defendants unlawfully hindered discovery, voluntarily produced documents reflecting a scheme to avoid judgment creditors, failed to show that there were no adequate means of relief other than by way of mandamus, and failed to show any clear legal error by the District Court. Under such circumstances, the issuance of a writ of mandamus might well constitute an abuse of discretion warranting this Court's intervention. *Cf. Allied Chem. Corp.*, 449 U.S. at 34-37 (reversing the issuance of a writ of mandamus). But its denial plainly does not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL J. DUNN *
WALTER H. SARGENT
HOLME ROBERTS & OWEN LLC
1700 Lincoln, Suite 4100
Denver, CO 80203
(303) 861-7000
Counsel for Respondent
Quebecor Printing
Fairfield Inc.

* Counsel of Record